**FILED AUGUST 23, 2001**
**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

No. C 88-02779 WHA

DEATH PENALTY CASE

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COLLEEN MARY ROHAN, ex. rel. OSCAR GATES, *Petitioner,*

**v.**

JEANNE WOODFORD, Warden, *Respondent.*

**ORDER RE MOTION FOR SUMMARY JUDGMENT ON CLAIM 1 AND § 292 (b) CERTIFICATION**

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## INTRODUCTION

In this capital habeas case, this order rejects petitioner's motion for a stay of all proceeding until, if ever, his mental competency is restored. This order also certifies this issue for interlocutory appeal under 28 U.S.C. 1292(b).

On June 7, 2001, respondent filed a summary judgment motion entitled "Motion For Summary Judgment (Part II)," in which she argues that Claim I in the federal petition is a pure question of law and that it lacks merit. On June 28, 2001, petitioner filed his opposition to summary judgment, which for all practical purposes is a cross-motion for summary judgment

in that it agrees Claim I is ripe for adjudication but contends Claim I has merit. On July 12, 2001, respondent filed a reply. A hearing on the motion was held on July 26, 2001.

For the reasons explained below, respondent's motion for summary judgment on Claim I is **GRANTED**. Because the issue presented in Claim I — whether Mr. Gates's current mental incompetency requires a stay of federal habeas proceedings pending restoration of his competency — involves a controlling question of law for which there is substantial ground for difference of opinion, and an immediate appeal of this order may materially advance the ultimate termination of the litigation, this order is certified for interlocutory appeal.[1/]

## STATEMENT

On December 10, 1979, Maurice Stevenson and his uncle, Lonnie Stevenson, were waxing his car in front of his grandfather's house in Oakland. At about 3:30 p.m., Oscar Gates appeared, holding a gun with his grandfather's house in Oakland. At about 3:30 p.m., Oscar Gates appeared, holding a gun with the trigger cocked. Mr. Gates led Maurice and Lonnie to the side of the house and ordered them to put their hands on the wall, empty their pockets, and remove their jewelry. After Maurice and Lonnie complied with these directives, Mr. Gates frisked them and asked Maurice as to the whereabouts of Maurice's father, James Stevenson. Maurice replied that he did not know and Mr. Gates told them that he was going to kill

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1. For added clarity in discussing Claim I and the issue of Mr. Gates's mental incompetence, the instant order distinguishes between the next friend (Colleen Rohan) and federal habeas counsel, who are referred to as "petitioner," and Mr. Gates.

them. Mr. Gates first shot Lonnie, who yelled for his father and started running toward the back of the house, then shot Maurice, picked up the money and some of the jewelry, and fled. Lonnie died but Maurice survived. Some time after the shooting, Mr. Gates called Jimmy Stevenson, Maurice's grandfather, and said that he had killed Lonnie and shot Maurice, that he was going to Los Angeles to kill members of another family, and that when he returned he would finish killing off the Stevenson family. On December 29, 1979, Mr. Gates was arrested in Vallejo, and the gun later determined to be the one that killed Lonnie Stevenson was found on him. *See People v. Gates*, 43 Cal.3d 1168, 1176-78 (1987).

On January 4, 1980, a complaint was filed in Alameda County. It charged Mr. Gates with murder (Cal. Penal Code § 187(a)), accompanied by the robbery/murder special circumstance (§ 190.2 (a)(17)(A)), two counts of robbery (§ 211), assault with a deadly weapon (§ 245(a)), possession of a firearm by an ex-felon (§ 12021), and escape (§ 4532(b)), among other things. He pled not guilty to all the charges. The trial began on March 16, 1981.

At trial, Mr. Gates asserted a claim-of-right defense. He testified about a so-called "Stevenson family forgery ring," purportedly headed by James Stevenson and Donald "Duck" Taylor, and of which, he, Lonnie and Maurice Stevenson, and Melvin Hines were all members. A dispute arose when he did not receive his "big cut" of $25,000 allegedly promised to him. In September 1979, a heated argument between Mr. Gates and other members of the forgery ring led to Mr. Gates being fired upon by Maurice and James Stevenson, which resulted in a gunshot wound to his leg. Thereafter, Mr. Gates learned through intermediaries that he would have to give up his claim to the money or he would be shot. On December 10, he allegedly spoke with Lonnie Stevenson by phone and made arrangements to pick up the money at Jimmy Stevenson's house

at about 3:00 p.m. Mr. Gates went to Jimmy Stevenson's house as had been arranged. As he approached, he saw Maurice and Lonnie outside waxing a car. He allegedly told Maurice and Lonnie that he was there to pick up his money and did not want any trouble, but that he had a gun and could take care of himself. As the three men made their way around the side of the house, Mr. Gates's suspicion was allegedly aroused by some of Maurice and Lonnie's actions, so he patted them down for weapons. After finding none, the three men continued toward the back of the house when Mr. Gates saw Jimmy Stevenson holding a gun. Gunfire erupted. Lonnie and Maurice were shot. Mr. Gates fled. On May 6, 1981, the jury convicted Mr. Gates of all charges and found the special circumstance allegation to be true.

At the penalty phase, the prosecution presented, as evidence in aggravation, evidence of Mr. Gates's convictions for robbery and for two assaults in connection with a 1978 robbery of a McDonald's restaurant, a 1973 conviction of rape, and a 1973 conviction for kidnapping. The prosecution also presented evidence that Mr. Gates was involved in a 1978 assault and robbery of two women at a Los Angeles mortuary, which had resulted in the death of one of the women. (Mr. Gates was later convicted of the Los Angeles mortuary crimes in a separate trial.)

The case in mitigation consisted of testimony by several of Mr. Gates's family members, several apartment neighbors, and a clinical psychologist. His family members described the racially-segregated environment in Belzoni, Mississippi, where he grew up. They testified that he was never in any trouble until an incident at a Western Auto Store when he was approximately 14 to 16 years old; the incident, which apparently involved Mr. Gates, who is African-American, striking a white woman who had struck him first, resulted in him spending six months in jail and becoming a target of police harassment and suspicion for

any problem that arose thereafter. Mr. Gates's mother also testified that she visited him in California in 1973 at a jail hospital after he had been beaten by the police. His neighbors described him as a friendly, sweet, considerate, good-hearted, good-natured person who never got angry and got along well with people. Dr. Paul Berg, a clinical psychologist, testified that Mr. Gates was "an unusually well-adjusted prisoner" and most likely would not present a problem in prison. *See Gates*, 43 Cal.3d at 1193-97. On May 28, 1981, the jury returned a death verdict.

The California Supreme Court affirmed Mr. Gates's conviction and sentence on direct appeal on October 15, 1987. *People v. Gates, supra*, 43 Cal.3d 1168. On May 23, 1988, the United States Supreme Court denied a petition for certiorari. *Gates v. California*, 486 U.S. 1027 (1988).

On August 2, 1988, Mr. Gates's state appellate counsel, Judd Iversen, filed a federal habeas petition alleging that Mr. Gates was mentally incompetent and unable to cooperate with counsel. On August 12, 1988, the Court stayed federal habeas proceedings pending completion of all relevant state court proceedings.[2/]

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2. There was at least one state proceeding pending, and another believed to be pending, when Mr. Iversen first filed a petition in this Court. Both state proceedings were related to Mr. Iversen's belief that Mr. Gates was incompetent, and that, before any proceedings could go forward, a determination of Mr. Gates's competency was required. On July 29, 1988, Mr. Iversen filed a petition for review in the California Supreme Court. The petition for review asked the California Supreme Court to review the state appellate court's decision denying a petition for writ of mandate and request for stay of execution. The California Supreme Court denied the petition for review on September 1, 1988. On July 29, 1988, Mr. Iversen also filed a

This Court appointed current federal habeas counsel, William L. Osterhoudt, on June 28, 1989, to replace Mr. Iversen in these proceedings due to Mr. Gates's beliefs about Mr. Iversen's involvement in an alleged conspiracy against him. On October 12, 1990, Mr. Osterhoudt filed a motion to determine Mr. Gates's competency, alleging that Mr. Gates was incompetent and unable to cooperate rationally with counsel. In 1990, the parties discovered the Alameda County Superior Court's minute order, denying the July 29, 1988, state habeas petition (*see* note 2). Accordingly, Mr. Iversen filed a renewed state habeas petition in Alameda County Superior Court on November 13, 1990, and this Court denied the motion filed by Mr. Osterhoudt without prejudice pending completion of state-court proceedings.

On March 6, 1991, the Alameda County Superior Court denied the renewed state habeas petition on the ground that the California Supreme Court was the appropriate forum. Mr. Iversen then filed a state habeas petition in the California Supreme Court on April 29, 1991. On February 11, 1992, the California Supreme Court denied the petition. Subsequently, on April 20, 1992, counsel renewed in this Court the motion to determine Mr. Gates's competency.

Mr. Gates's competency was litigated over the ensuing two-and-a-half years, at least in part because of his resistance to submit to a psychiatric examination (Second Amended Petition at 20-22). On November 14, 1994, the Court found Mr. Gates mentally incompetent, appointed Colleen Rohan to act as petitioner's next friend, and directed the federal habeas petition

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state habeas petition in Alameda County Superior Court. Apparently unbeknownst to the parties, the Alameda County Superior Court denied the state habeas petition without prejudice in a minute order on August 8, 1988 (Second Amended Petition at 13-14).

to be filed within 120 days. After several extensions of the filing deadline, the first amended federal habeas petition was filed on November 13, 1995.

On February 2, 1996, respondent moved to dismiss the federal petition on the ground that it contained unexhausted claims, or in the alternative, to compel exhaustion. On March 8, 1996, petitioner filed a motion to stay the federal habeas proceedings pending restoration of Mr. Gates's competency. On April 29, 1996, the Court denied petitioner's motion to hold these proceedings in abeyance pending restoration of Mr. Gates's competency. On September 5, 1996, the Court determined which claims in the federal petition had not been exhausted, granted respondent's motion to compel exhaustion and defer filing of the answer, granted petitioner's motion to hold these proceedings in abeyance pending exhaustion, and ordered petitioner to present promptly all unexhausted claims to the California Supreme Court.

Petitioner filed a state habeas petition on April 23, 1997. On January 25, 2000, the case was reassigned to the undersigned. On October 25, 2000, the California Supreme Court denied the state habeas petition. *See In re Oscar Gates,* No. S060778. Petitioner filed a second amended federal habeas petition on December 26, 2000.

In Claim I, petitioner asserts that Mr. Gates "has a constitutional right to competency in the instant proceedings, and [Mr. Gates's] current incompetency requires that these proceedings be stayed," based on the Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as the statutory right to federal habeas counsel (Second Amended Petition at 24-30).

The key facts underlying his claim and those relevant to the parties' arguments are not disputed. They are: (1) on November 14, 1994, the Honorable Fern M. Smith, United States District

Judge, "[found] Mr. Gates presently incompetent, in that he presently suffers from a mental disorder that may substantially affect his capacity to cooperate with counsel and proceed with his petition in this court," and the disorder "denies Mr. Gates the capacity to appreciate his position and to make rational choices with respect to these habeas proceedings," (Memorandum and Order: Ruling Re Motion To Determine Mental Competency Of Petitioner at 7);[3/] (2) Judge Smith appointed Colleen M. Rohan, an attorney, "to serve as next friend to Mr. Gates for his federal habeas proceedings before this court," which included the responsibility to "verify the petition," (*id.* at 7-8), and "to act for Mr. Gates and make appropriate decisions on his behalf," (Dec. 28, 1994 Order at 1); and (3) in an order filed on April 29, 1996, Judge Smith denied "[p]etitioner's request to hold these proceedings in abeyance pending restoration of Gates's competency" (Order Re: Status, Scheduling and Exhaustion at 2). It should be added further that, upon inquiry by the Court, neither party now contends that Mr. Gates's mental competence has been restored. Accordingly, with no material fact in dispute, Claim I is ripe for summary

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3. In the order, Judge Smith described the nature of Mr. Gates's beliefs as follows:

> Mr. Gates allegedly believes that both his appointed counsel and this court are part of a state conspiracy to execute him. He claims that this conspiracy is racially motivated and designed to prevent him from disclosing a secret formula made with yellow chili peppers that will cure AIDS. He also claims a right to a trust fund set up by Howard Hughes.
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> (Memorandum and Order: Ruling Re Motion To Determine Mental Competency Of Petitioner at 6.)

adjudication.

Respondent argues that there is no constitutional right to competency in federal habeas proceedings and that the appointment of a next friend provides adequate protection for Mr. Gates's interests (Ans. Memo. at 16-17). Additionally, respondent contends that the issue about whether Mr. Gates's current mental competency requires a stay of these proceedings "has already been decided against petitioner in prior proceedings and is thus barred by the doctrine of law of the case" (Motion at 3-4).

Petitioner argues that Mr. Gates has a constitutional right to competency in federal habeas proceedings based on the Eighth and Fourteenth Amendments' requirement of heightened due process in capital cases and corollary right to reliable sentencing in capital cases, the general due process requirement that criminal defendants be mentally competent, and the Sixth Amendment right to counsel in habeas proceedings (Second Amended Petition at 24-27). Petitioner further argues that the statutory right to federal habeas counsel also requires the instant proceedings be stayed pending restoration of Mr. Gates's competency (*id.* at 27). The essential thrust of petitioner's argument about the violation of Mr. Gates's constitutional and statutory rights is that, because habeas proceeding involve matters outside of the record about which the condemned inmates is mentally incompetent could lead to the adjudication of a habeas petition that does not contain all potentially meritorious claims and/or all material facts in support of the claims in the petition. (*id.* at 27-28). Petitioner also contends that the law-of-the-case doctrine does not apply in capital habeas proceedings, and assuming arguendo it does apply, it is a discretionary doctrine and several circumstances justify reconsideration of whether the instant proceedings should be stayed pending restoration of Mr. Gates's competence (Opp. at 18-20).

## ANALYSIS

Before turning to the merits of Claim I, two preliminary points need to be addressed. First, Claim I is not a true habeas claim in that it does not challenge the legality of any aspect of the state judgment against Mr. Gates, but is related only to the conduct of federal habeas proceedings. *See* 28 U.S.C. 2254(a) ("a district court shall entertain an application for write of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court *only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States*") (emphasis added). But, because the issue raised in Claim I potentially has a significant and wide-ranging impact on Mr. Gates's ability to raise all meritorious legal challenges to his conviction and sentence, deciding the instant motion on the ground that Claim I does not directly challenge the legality of Mr. Gates's conviction and sentence is unwarranted. Rather, Claim I shall be construed for what it truly is: a motion to stay federal habeas proceedings pending restoration for Mr. Gates's competence.

As noted, Judge Smith previously denied such a motion in this case. Judge Smith's prior denial lead to the second preliminary point: whether the Court can and should reconsider this issue given Judge Smith's prior denial? Respondent contends that Judge Smith's ruling, pursuant to the law-of-the-case doctrine, bars reconsideration of whether these proceedings must be stayed pending restoration of Mr. Gates's mental competence (Motion at 3-4).

In *City of Los Angeles v. Santa Monica BayKeeper*, 245 F.3d 882, 2001 WL 709267, *1 (9th Cir. June 26, 2001), the Ninth Circuit addressed "the validity of a rescission order issued by the district court purporting to withdraw its previous order certifying an interlocutory appeal, and the effect the rescission order has on our ability to hear this appeal." The district court

issued an order certifying an interlocutory appeal on October 28, 1999, issued on order denying the motion for certification on November 18, 1999, and then, to resolve the inconsistency between the two orders, "issued a final order on December 28, 1999, purporting to withdraw the October 28 certification order." *Ibid.* While the proceedings were ongoing in the district court, the parties seeking interlocutory review filed with the Ninth Circuit, by November 8, 1999, separate petitions for certification of the interlocutory appeal, and the Ninth Circuit approved the petitions on February 29, 2000. *Id.* at *1-2. In *Santa Monica BayKeeper*, the Ninth Circuit concluded that the district court had properly rescinded the October 28 certification order and the rescission order divested it of jurisdiction to hear the interlocutory appeal. *Id.* at *2. The Ninth Circuit rejected the argument that the district court's rescission order violated the law of the case, explaining:

> The law of the case doctrine originated in the courts as a means of ensuring the efficient operation of court affairs. Specifically, this doctrine was designed to further the "principle that in order to maintain consistency during course of a single lawsuit, reconsideration of legal questions previously decided should be avoided." While courts are generally urged to adhere to this doctrine, it is "not an inexorable command." That is, the doctrine "is discretionary, not mandatory" and in no way is "a limit on [a court's] power." [¶] Here the law of the case doctrine is wholly inapposite. *The doctrine simple does not impinge upon a district court's power to reconsider its own interlocutory order provided that the district court has not been divested of jurisdiction over the order.*

*Id.* at *6 (citations omitted) (*citing with approval, United States v. Houser,* 804 F.2d 565, 568 (9th Cir. 1986) ("All rulings of a

trial court are subject revisions at the any time before the entry of judgment. A trial court may not, however, reconsider a question decided by an appellate court").

In the instant case, since there has been no final judgment nor has Claim I been decided by an appellate court, the law of the case does not prevent reconsideration of the issue raised in Claim I. Moreover, even if the law of the case applied generally, it is a discretionary doctrine and an intervening change in the law is one of the identified basis under which a district court can depart from that doctrine. *See United States v. Alexander,* 106 F.3d 874, 876 (9th Cir. 1997); *Thomas v. Bible,* 983 F.2d 152, 154-55 (9th Cir. 1993). Here, Judge Smith ruled on petitioner's request for a stay pending restoration of Mr. Gates's competency in April 1996. At that time, the principal authority that creates a substantial ground for difference of opinion on the appropriate resolution of Claim I, *Calderon v. United States District Court* (*"Kelly V"*), 163 F.3d 530 (9th Cir 1998) (en banc), had not yet been decided. As such, the issuance of *Kelly V* subsequent to Judge Smith's ruling warrants reconsideration of the issue raised in Claim I.

**A. Claim 1**

The issue raised in Claim I is straightforward: does Mr. Gates's current mental incompetency, in particular, his inability to consult with or assist federal habeas counsel, require these proceeding to be stayed until his competence is restored? Petitioner argues that a stay of federal habeas proceedings is required because habeas proceedings involve matters outside of the record about which the condemned inmate would have unique knowledge, and so proceeding while the condemned inmate is mentally incompetent could lead to adjudication of a habeas petition that does not contain all potentially meritorious claims and/or all material facts in support of the claims in the petition (Second Amended Petition at 27-28). There is no

authority directly addressing the precise issue raised in Claim I. The greater weight of relevant authority indicates, however, that when a federal habeas petitioner is found to be mentally incompetent during federal habeas proceedings that appropriate remedy is to appoint a next friend and proceed; it is not to stay the proceedings until the inmate's competence is restored.

Review of the federal habeas statute, the cases which the habeas statue codified, and cases involving condemned inmates seeking to waive habeas or appellate review strongly indicates that when a condemned inmate is found to be mentally incompetent during federal habeas proceedings the appropriate course of action is to appoint a next friend to pursue habeas relief on the inmate's behalf and proceed. Section 2242 of Title 28 of the United States Code states, "[a]pplication for a write of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or *by someone acting in his behalf*" (emphasis added). When congress added the italicized language to the federal habeas statue in 1948, the effect of which was to codify the doctrine of next-friend standing in federal habeas proceedings, "the revisers noted that the change 'followed the actual practice of the courts.'" *Whitmore v. Arkansas*, 495 U.S. 149, 162-63, n.3. (1990) (quoting Revisers' Notes to 28 U.S.C. § 2242 (1982 ed.)). That "actual practice" was to allow a next friend to pursue federal habeas relief on behalf of a detained person when the detained person was unable to do so on his or her won, *see Collins v. Traeger*, 27 F.2d 842, 843 (9th Cir. 1928) (allowing next friend to pursue habeas relief on behalf of detained person), and mental incapacity of the detained person was recognized to be a ground where appointment of a next friend was appropriate. *See United States, ex. rel. Bryant v. Houston*, 273 F. 915, 916-17 (2nd Cir. 1921) (noting that mental incapacity of a prisoner is one situation where appointment of a next friend is appropriate, but dismissing putative next-friend's petition because she failed to set forth reason why inmate was unable to

prosecute petition on his own); *United States, ex. rel. Funaro v. Watchorn,* 164 F.3d 152, 153 (S.D.N.Y. 1908) (noting that lack of time, infancy, or incompetency provide basis for allowing a next friend to pursue habeas relief on behalf of detained person). Thus, the federal habeas statute, and the cases on which the language in Section 2242 is based, contemplate that there may be occasions where the detained person is mentally incompetent to pursue habeas relief and that the statute provides for that situation by allowing a next friend to be appointed and pursue relief on behalf of the detained person.

More recent cases addressing the situation where a condemned inmate seeks to waive appellate and/or collateral review similarly reflect the understanding that the appropriate remedy for a mentally incompetent inmate during federal habeas proceedings is to appoint a next friend to pursue habeas relief. In *Whitmore v. Arkansas,* 495 U.S. 149 (1989), Ronald Simmons sought to waive all further appellate proceedings following his conviction and death sentence for murdering 14 family members, and state court found him mentally competent to make the waiver and that the waiver was knowing and intelligent. *Whitmore,* 495 U.S. at 152-153. Roughly a month before Simmons' scheduled execution, a fellow death row inmate (Whitmore) sought to intervene as a next friend, prevent Simmons' execution and pursue appellate relief on Simmons' behalf. *Id.* at 153-54, 161-62. The Supreme Court explained:

> A "next friend" does not himself become a party to the habeas corpus action in which the participates, but simple *pursues the cause on behalf of the detained person*, who remains the real party in interest. . . . Decisions applying the habeas corpus statue had adhered to at least two firmly rotted prerequisites for "next friend" standing. First, a "next friend" must proved an adequate explanation — such as inaccessibility, *mental incompetence,* or other

> disability — why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate.

*Id.* at 163-64 (emphasis added) (citations omitted). The Supreme Court concluded that Whitmore was unable to establish next-friend standing because an evidentiary hearing in state court showed that Simmons was mentally competent and had given a knowing, intelligent, and voluntary waiver of his right to appeal. *Id.* at 165-66.

*Vargas v. Lambert,* 159 F.3d 1161 (9th Cir. 1998), involved a similar fact pattern. Following his conviction and death sentence, Jeremy Sagastequi "request[ed] to waive his rights to appeal and to the assistance of counsel for any review of his sentence." *Vargas*, 159 F.3d at 1163. Less than a month before his scheduled execution, Sagastequi's mother, Katie Varga, moved to intervene as her son's next friend and to file a state habeas petition on his behalf, and then following denial of that motion in state court, filed a similar motion in federal district court, which was also denied. *Id.* at 1165. The Ninth Circuit reversed, however, holding that Vargas has presented sufficient, meaningful evidence that since the last competency hearing Sagastegui's mental functioning may have had deteriorated significantly such that he may no longer be mentally competent to waive review, and remanded the matter to the state court to conduct an evidentiary hearing to resolve Sagastegui's competence. *Id.* at 1169-71. Significantly, the Ninth Circuit said that if, following the evidentiary hearing, Sagastegui was found presently incompetent, "Vargas [would] have to standing to file habeas proceedings as his next friend." *Id.* at 1171. It did not suggest that a stay of federal habeas proceedings pending restoration of Sagastegui's competency would be required. *Ibid.*

In sum, *Whitmore* and *Vargas* contemplate that the remedy for a condemned inmate who is or becomes mentally incompetent during habeas proceedings is to appoint a next friend and that the next friend" pursues the cause on behalf of the detained person." *Whitmore,* 495 U.S. at 163. Neither case suggested that a finding of mental incompetency during habeas proceedings would require or warrant a stay of federal habeas proceedings.

Not only do the foregoing authorities indicate that appointment of a next friend to pursue habeas relief is contemplated as the appropriate response when the condemned inmate is or becomes mentally incompetent during federal habeas proceedings, but staying federal habeas proceedings because of a habeas petitioner's inability to communicate with counsel is in tension with *Ford v. Wainwright*, 477 U.S. 399 (1986), and the role of federal habeas review generally.

In *Ford,* Supreme Court held that the Eighth Amendment prohibits execution of the insane. *Ford*, 477 U.S. at 401. To be competent to be executed, the condemned inmate must be aware of the punishment he or she is about to suffer and the reason why. *Id.* at 422-23 (Powell, J., concurring): *see also Massie v. Woodford*, 244 F.3d 1192, 1195 n.1 (9th Cir 2001) (citing Justice Powell's concurring opinion as establishing standard for competency to be executed). In determining the appropriate standard for competency to be executed, Justice Powell considered the various rationales offered at common law to explain the "ancient prohibition on execution of the insane." *Id.* at 419. he noted that one suggested rationale was "that the prohibition against executing the insane was justified as a way of preserving the defendant's ability to make arguments on his own behalf" and possibly avoid execution, but concluded that his justification "has slight merit today." *Id.* at 419-20. He explained:

> Modern practice provides far more extensive review of convictions and sentences than did the common law, including not only direct appeal but ordinarily both state and federal review. Throughout this process, the defendant has access to counsel, by constitutional right at trial, and by employment or appointment at other Stages of the process whenever the defendant raises substantial claims. . . . These guarantees are far broader than those enjoyed by criminal defendants at common law. It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free.

*Id.* at 420.[4] Justice Powell further stated, "a standard [for competency to be executed] that focused on the defendant's ability to assist in his defense would give to little weight to the State's interest in finality, since it implies a constitutional right to raise new challenges to one's criminal conviction until the sentence has run its course. Such an implication is false[.]" *Id.* at 421.

Petitioner's contention that his current inability to assist federal habeas counsel requires federal habeas proceedings to be stayed pending restoration of his competence, if ever, raises the prospect that Mr. Gates, without ever demonstrating constitutional error at his trial and even though he may be mentally competent to be executed, could effectively prevent execution of the presumptively-valid judgment against him. Admittedly, *Ford* involved a different factual scenario than

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4. Justice Powell added that, "in cases tried at common law execution often followed fairly quickly after trial, so that incompetence at the time of execution was linked as a practical matter with incompetence at the trial itself." *Ford,* 477 U.S. at 420-21.

these proceedings in that questions about Ford's mental functioning did not arise until after he had fully litigated his federal habeas petition. Nonetheless, the prospect raised by petitioner's contention, at minimum, places it in tension with the holding in *Ford* and it's rejection of "the ability to assist counsel" as part of the standard to be executed.

Moreover, petitioner's argument in Claim I appears to reflect an attempt to import trial-level constitutional safeguards — such as, the right to effective assistance of counsel and competency to stand trial — into federal habeas proceedings. The role of federal habeas review is not to re-try the original trial, however, but instead is limited to review for federal constitutional error. As the United States Supreme Court has explained:

> When the process of direct review — which, if a federal question is involved, includes the right to petition this Court for writ of certiorari — comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely. The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error.

*Barefoot v. Estelle,* 463 U.S. 880, 886-87 (1983). Ordinarily, the best evidence of any constitutional error at trial will be the trial record itself. Thus, given the more limited review of

federal habeas, and the fact that resolution of many claims will not necessitate any input from the condemned inmate, there is no justification for staying federal habeas proceeding in their entirety simply because the inmate cannot communicate with federal habeas counsel and possibly provide information that might strengthen some of the claims in the petition or give rise to other claims.

The Court invited a submission from petitioner setting forth the claims where Mr. Gates's input would be material and describing the type of information Mr. Gates might be available to provide. On August 6, 2001, petitioner submitted such information. Without revealing the content of that submission, it can be described as being fairly general. Accordingly, at the present time, and on the present record, the Court finds that a stay of these proceedings is not warranted.

**B. 28 U.S.C. 1292(b)**

A recent statement by the Ninth Circuit in an en banc decision casts some doubt on the foregoing conclusion. In *Calderon v. United States District Court* (*"Kelly V"*), 163 F.3d 530 (9th Cir. 1998) (en banc), one of the issues before the Ninth Circuit was whether Kelly's alleged mental incompetency justified equitable tolling of the statue of limitations for filing a federal habeas petition. The court concluded, "when a putative habeas petitioner's mental competency is at issue, and the record discloses a genuine basis for concern, it is appropriate to toll the AEDPA's time bar until a reasonable period after the district court makes a competency determination." *Kelly V,* 163 F.3d at 541. The Ninth Circuit reasoned:

> Under 21 U.S.C. §848(q)(4)(B), Kelly has a statutory right to counsel in his federal habeas proceeding. That right contemplated effective communication

> between lawyer and client. A putative habeas petitioner's mental incompetency – a condition that is, obviously, an extraordinary circumstance beyond the prisoner's control – renders the petitioner unable to assist his attorney in the preparation of a habeas petition. Such a condition could eviscerate the statutory right to counsel. Where, as here, there is a threshold showing of mental incompetency, a sufficient showing has been made for equitably tolling the statue of limitations.

*Ibid.; cf. McFarland v. Scott,* 512 U.S. 849, 855059 (1994) (holding that appointment of federal habeas counsel, pursuant to 21 U.S.C. 848(q)(4)(B), prior to filing of the federal petition is necessary to give the statue any meaning as a practical manner because the complex nature of capital-habeas jurisprudence, including the consequences for failing to include all possible claims in the first petition, makes it unlikely that petitioner could file successful petitions for collateral relief without the assistance of counsel.)

In addition, while ordinarily the trial record will be sufficient to resolve federal habeas claims, there could be a case where there is a strong showing of potential constitutional error and resolution of the claim or claims would turn on facts and circumstances known only to the inmate. In such a situation, the inmate's ability to consult with counsel could be crucial, and proceeding on the claim or claims while the inmate is mentally unable to provide the crucial information would seem to diminish the limited, but "particularly important role [federal habeas corpus] play[s] in promoting fundamental fairness in the imposition of the death penalty." *McFarland,* 512 U.S. at 859.

Petitioner further contends that the actions of the United States Supreme Court in *Rees v. Peyton,* 384 U.S. 312 (1966) (*"Rees I"*), *Rees v. Peyton,* 386 U.S. 989 (1967) (*"Rees II"*),

*Rees v. Peyton,* 516 U.S. 222 (1995) (*"Rees III"*), and *Anderson v. Kentucky,* 376 U.S. 940 (1964), demonstrate that "when a petitioner has been judged mentally incompetent during habeas proceedings involving review of a capital state judgment, the case must be stayed, pending restoration of the petitioner's competency" (Opp. at 13).

In *Anderson,* following affirmance of his conviction and death sentence by the Kentucky Court of Appeals, and the filing a petition for certiorari review, *see Anderson v. Kentucky,* 371 U.S. 886 (1962), the case was continued indefinitely, allegedly due to Anderson's mental incompetence, "[b]y joint agreement of the parties." *Anderson v. Kentucky,* 376 U.S. 940, 940 (1964).

In *Rees*, approximately one month after filing a petition for certiorari review of the denial of his federal habeas petition by the United States Court of Appeals for the Fourth Circuit, "Rees directed his counsel to withdraw the petition and forgo any further legal proceedings." *Rees*, 384 U.S. at 313. Rees's counsel refused because he doubted Rees's mental competence to make that decision. *Ibid.* The Supreme Court stated that before it could determine whether Rees would be allowed to withdraw his petition the question of Rees's mental competency had to be resolved and os it remanded the case to the district court, though retaining jurisdiction, for the district court to conduct an evidentiary hearing on Rees's mental competence and report back. *Id.* at 313-14. There are no reported decisions as to what occurred following this remand except for two brief Supreme Court orders. In *Rees II,* the Supreme Court issued an order stating, "[t]his case is held without action on the petition until further order of the Court." *Rees II,* 386 U.S. at 989. Then, nearly 30 years later, and purportedly in response to Rees's death, (Second Amended Petition at 26, n. 18), the Supreme Court issued an order stating, "[p]etition for writ of certiorari to the United States Court of Appeals for the Fourth

Circuit dismissed." *Rees III,* 516 U.S. at 222.

Neither *Kelly V* nor the series of orders in *Anderson* and *Rees* resolve the present issue. Because *Kelly V* involved the issue of equitable tolling of the statute of limitations it is not controlling authority for the issue raised in Claim I. Notably, as well, the Ninth Circuit did not suggest that a finding of mental incompetency by the district court on remand would require or warrant a stay of the proceedings. *See Kelly V*, 163 F. 3d at 541. Unlike *Anderson,* where the case was stayed by joint agreement of the parties, respondent does not agree to stay of these proceedings. And, while the Supreme Court in *Rees* apparently did stay the proceedings indefinitely following a determination that Rees was mentally incompetent, the order doing so does not explain the reasoning behind the action. Nonetheless, the Ninth Circuit's reasoning in *Kelly V,* as well the possibility that a situation could arise where a condemned inmate's input would be crucial in resolving a claim or claims, provide a substantial ground for a difference of opinion over this Court's resolution of Claim I.

Additionally, the issue raised in Claim I concerning Mr. Gates's inability to consult with counsel is a controlling question of law, in that, while collateral to the merits of the federal petition, it has the potential to impact significantly Mr. Gates's ability to demonstrate federal constitutional error at trial. As discussed above, proceeding while petitioner is unable to consult with counsel could lead to the adjudication of federal petition that does not include all material facts or meritorious claims that might entitle petitioner to relief, and spare him from execution.

Moreover, an immediate appeal from the instant order may materially advance the ultimate termination of the litigation before this Court because the court of appeals could hold that Mr. Gates's inability to assist his federal habeas counsel

requires these proceedings to be stayed pending restoration of his competence. Should Mr. Gates never regain competency, such an order by the court of appeals would effectively terminate the litigation in this Court and avoid needless litigation and use of resources.

For instance, today, the Court issued a lengthy order addressing respondent's affirmative defenses of procedural default and the non-retroactivity rule of *Teague v. Lane,* 489 U.S. 288 (1989). In terms of the litigation remaining in this case, that order is jut the tip of the iceberg. Indeed, despite that lengthy order, supplemental briefing on the affirmative defenses is needed, and has been ordered, in order to resolve them completely. Beyond that, petitioner has indicated that he intends to move for an evidentiary hearing and for authorization to engage in discovery. If either, or both, of those request are warranted, additional time and resources will be expended in preparing for the hearing, litigating discovery and evidentiary matters related to the hearing, and in holding the hearing. Regardless of whatever any evidentiary hearing is held or any discovery authorized, there presumably will be extensive briefing on the merits of whichever of the 34 claims for relief survive respondent's affirmative defenses. Because Mr. Gates is indigent, all the hours his attorneys spend litigating this case, and any investigative and/or expert services that are reasonably necessary for that litigation, are paid for with funds provided by the Criminal Justice Act. In the end, all the time and money expended litigating this case could be for naught if, following resolution of the petition, the court of appeals holds that this Court should have stayed these proceedings pending restoration of Mr. Gates's competence, a circumstance whose occurrence is not for certain.

Accordingly, although the greater weight of relevant authority indicates that a stay of federal habeas proceedings is not required, this Court, for the reasons explained above, finds

this order to be appropriate for certification for interlocutory review pursuant to Section 1292(b) of Title 28 of the United States Code.

## CONCLUSION

For the reasons explained above, **IT IS HEREBY ORDERED** that respondent's motion for summary judgment on Claim I is **GRANTED.** The Court certifies, however, that this order "involves a controlling of question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. 1291(b).

**IT IS SO ORDERED.**

Dated: August 23, 2001.

WILLIAM ALSUP
United States District Judge